to large incumbents.[43] Thus, the study concluded, "the only plausible explanation for the dramatically lower prices paid by large MSOs is the leverage associated with control over very large blocks of multichannel video subscribers."[44]

The Initial Comments further demonstrate that incumbent cable operators derive their leverage over independent cable networks from their control over access to large numbers of subscribers and the fact that cable networks must reach a critical mass of viewers (approximately 20 million) to be successful. As BellSouth points out, "a programming service has no chance of success without access to a critical mass of subscribers," and "programmers, therefore, are becoming ever more beholden to the large MSOs as AT&T and others tighten their control over distribution on a national and regional scale."[45] Because competitors reach far fewer subscribers than incumbents, they lack sufficient bargaining power to obtain similar discounts.[46]

The Competitive Cable Providers are not the only ones who have had to pay discriminatorily high prices for programming. Small incumbent cable operators also report that they confront significantly higher per-subscriber programming costs than large incumbent operators.[47] They too ascribe their inability to negotiate discounts to their smaller subscriber

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[43] *Id.* at 11-18.

[44] *Id.* at 18.

[45] BellSouth Comments at 8.

[46] As Echostar aptly observed: "Since the availability of programming is key to the success of any MVPD product, and programming costs are among the most significant cost items faced by any distributor, [incumbent operators' increasing buying] power in the programming market directly affects [new entrants'] ability to compete with those operators in obtaining even independent programming." Echostar Comments at 7.

[47] American Cable Association Comments at 4-5.

bases – "[smaller cable systems] generally do not benefit from programming and equipment discounts offered to larger systems and competitors."[48]

The substantial programming price differentials observed by such competitors places new entrants at a significant cost disadvantage, limiting their ability to compete effectively in the MVPD market. As Ameritech noted in its comments, the Dertouzos/Wildman study concluded that smaller MVPDs confront an annual, per-subscriber programming cost disadvantage that exceeds one month's subscriber revenue.[49] As a consequence, new entrants are "significantly hampered in their efforts to compete viably in the video marketplace."[50] The anticompetitive effect of this discrimination is exacerbated because many of the most popular programming networks are owned or controlled by incumbent MSOs, which means that any increase in programming costs imposed on new entrants directly benefits their larger rivals.[51]

Despite the overwhelming evidence in the record of significant programming cost differentials, incumbent operators, like the Wizard of Oz, urge the Commission "to pay no attention" to the facts. Against all the evidence, they insist that video competition is flourishing and, therefore, that the Commission should relax its regulation of incumbent operators.[52]

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[48] *Id.* at 4-5.

[49] Ameritech Comments at 12. *See also* American Cable Association at 5 ("These higher per-subscriber [programming] costs reduce cash flows and lower rates of return.").

[50] Ameritech Comments at 12.

[51] *Id.*

[52] *See* Comments of the National Cable Television Association at 3-4 (NCTA Comments) ("Already, the video market in which cable operators compete for viewership today is competitive."); MediaOne Comments at 2 ("healthy competition in the multichannel video marketplace exists and continues to intensify throughout the United States"); AT&T Comments at 25-26 ("[C]ompetition has transformed the MVPD marketplace and rendered obsolete

AT&T, in particular, contends that the suspended cable horizontal ownership limits should be revised or eliminated in light of today's purportedly "competitive marketplace."[53] Although it acknowledges that Congress enacted the limits based on its concern that cable operators could "exercise monopsony power to force unfair concessions from programmers," it claims that the growth of DBS providers and other non-cable MVPDs "necessarily reduces any MSOs power... to obtain unfair concessions from programmers."[54]

However, AT&T's claims are belied by the record in this proceeding and marketplace facts. In the first place, DBS does not currently provide the competitive alternative AT&T claims it does, and it certainly does not constrain incumbent MVPDs ability to extract unfair concessions from programmers, as Echostar would likely attest. As Commissioner Tristani aptly stated, "[i]t shows how starved we are for competition that anyone could look at the competitive choice provided by DBS and declare victory."[55]

More importantly, as discussed above, the record is replete with evidence that incumbent cable operators can and do utilize their control over large blocks of cable subscribers to extract steep discounts (which cannot be justified by lower costs) from cable networks, including independent networks. Thus, the market conditions that led Congress to enact the horizontal

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the notion that cable does not face a credible competitive threat. Strict regulation of the cable industry, therefore, is no longer necessary or appropriate.").

[53] *Id.* at 25-26.

[54] *Id.* at 26.

[55] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24284 (1998) (Statement of Commissioner Gloria Tristani). Commissioner Tristani's statement is as true today as it was when she made it last December.

ownership limits continue to persist. The Commission should require strict cost justification of any volume discounts offered to MSOs that are not offered to competitive MVPDs, as BellSouth and OpTel propose.[56] This minimal step would go a long way towards eliminating the market distorting discounts extracted by incumbent operators.

IV. THE COMMISSION'S CABLE INSIDE WIRING RULES ARE INADEQUATE TO PROMOTE COMPETITION IN THE MDU ENVIRONMENT.

A. <u>In General</u>.

The Initial Comments filed on behalf of the various Competitors to Cable reaffirm that the Commission's cable inside wiring rules have done little to disarm incumbent cable operators of their arsenal of tactics for delaying competitive entry in the MDU environment. As reflected in the comments filed by RCN, those tactics continue in full force and disserve the public interest by denying consumers the opportunity to obtain service from competing MVPDs.[57] RCN's comments also reflect that the Commission's slow response to inside wiring disputes worsens the problem by subjecting all competitors to delays that inevitably work only to the advantage of the incumbent.[58] Given that nearly a third of all homes in the United States are contained in MDUs, the potential damage to all competitors and their customers from this scenario is self-evident.

Incumbent cable operators can and will continue to employ a variety of anticompetitive tactics in the MDU environment notwithstanding the existence of the Commission's inside

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[56] BellSouth Comments at 18; OpTel Comments at 10.

[57] *See generally* Initial Comments of RCN at 15-18.

[58] *Id.* at 17-18. RCN notes that a request for an interpretive ruling concerning the accessibility of home run wiring behind walls, filed in September of 1998, has not yet been addressed by the Cable Services Bureau, leaving hundreds of potential subscribers unreachable. *Id.*

wiring rules. Ameritech notes that incumbent cable operators continue to block competition by refusing to remove lockboxes that prevent access to existing wiring.[59] The Wireless Communications Association International, Inc. notes that the Commission's rules still allow an incumbent to remove its wiring before a new entrant arrives on the property, and thus give an incumbent the option to force a competitor to "postwire" the premises.[60] For aesthetic and/or safety reasons, property owners often do not permit postwiring, and in these situations the incumbent's election to remove its wiring effectively blocks any competitive entry on the property by another MVPD.[61] OpTel points out that the disadvantages competitors already have under the Commission's inside wiring rules have been exacerbated by the fact that the Commission now allows franchised cable operators to offer "bulk" discounts to residents of MDUs on a unit-by-unit basis.[62] Thus, even where a new entrant is willing to compete on a unit-by-unit basis, it now must allow for the fact that an incumbent may respond to a competitive threat by blocking access to existing wiring and offering subscribers targeted discounts.[63]

Indeed, OpTel's recent *ex parte* filing in the Commission's inside wiring docket brings

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[59] Comments of Ameritech at 14. Ameritech's experience is not unique - BellSouth has encountered a similar problem with incumbent-owned lockboxes in the Jacksonville, Florida MDU environment. RCN has experienced similar difficulties in the Boston, Massachusetts MDU environment.

[60] Comments of The Wireless Communications Association International, Inc. at 18-20 (current rules aggravate the "postwiring" problem by permitting incumbents to remove their wiring upon termination of service).

[61] *Id.*

[62] Comments of OpTel, Inc. at 5.

[63] *Id.*

the shortcomings of the Commission's rules into even sharper focus.[64] In that submission OpTel explains that the rules have done nothing to stop the incumbent cable operator, Charter Communications ("Charter"), from ignoring OpTel's attempt to invoke the Commission's home run wiring procedures in an MDU for which OpTel holds a contract with the property owner. Instead, Charter has blocked OpTel's entry onto the property by, alternatively, (1) making an unsubstantiated claim that it owns the building's internal wiring; (2) raising a variety of specious arguments that it has a legal right to remain on the property; and (3) threatening the property owner with a lawsuit, and, perhaps not coincidentally, soliciting the property owner to enter into a long-term service contract with Charter in exchange for "substantial compensation."[65] Ironically, these are precisely the sort of dilatory, anticompetitive tactics that the Commission's inside wiring rules were supposed to eliminate.[66] The fact remains, however, that so long as the Commission imposes on incumbents only a vague duty to "cooperate" with competing providers,[67] incumbent cable operators will continue to take full advantage of the latitude the

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[64] Letter from Michael E. Katzenstein, Vice-President and General Counsel, OpTel, Inc., to Deborah A. Lathen, Chief, Cable Services Bureau, CS Docket No. 95-184 et al. (July 29, 1999).

[65] *Id.* at 2.

[66] *See Telecommunications Services - Inside Wiring*, 13 FCC Rcd 3659, 3679-80 (1997) *recon. pending, appeal pending sub nom. Charter Communications, Inc. v. FCC* (8th Cir., Case No. 97-4120). ("The record reflects that, where the property owner or subscriber seeks another video service provider, instead of responding to competition , . . ., the incumbent provider often invokes its alleged ownership interest in the home run wiring. Incumbents invoke written agreements providing for continued service, perpetual contracts entered into by the incumbent and previous owner, easements emanating from the incumbent's installation of the wiring, assertions that the wiring has not become a fixture and remains the personal property of the incumbent . . . . Invoking any of these reasons, incumbents often refuse to sell the home run wiring to the new provider or to cooperate in any transition. . . The litigation alternative, an option rarely conducive to generating competition, while typically not pursued by the property owner or subscriber, can be employed aggressively by the incumbent. The result, . . is to chill the competitive environment.").

[67] *See* 47 C.F.R. § 76.804(a)(5) ("The parties shall cooperate to avoid disruption in service to subscribers to the extent possible.").

Commission has given them to prevent competitive entry in the MDU environment at any and all costs.

B. The Commission Can and Should Promote Competition in the MDU Environment By Prohibiting Perpetual Exclusive Contracts.

The Coalition members submits that the Commission has authority to prohibit all perpetual exclusive contracts between incumbent cable operators and property owners. The vast majority of these contracts were entered into before the arrival of any video competition in the marketplace, and their continued existence injures the public interest by preventing property owners and their tenants from having an opportunity to select among competing providers.[68] The simple fact is that cable incumbents have less incentive to bring high-quality, competitively priced multichannel video service to tenants quickly if there is no threat that a competitor will be able to offer a competing service.[69] So long as perpetual exclusive contracts continue to frustrate competitive entry into the MDU environment, tenants will never enjoy the benefits of unrestrained, head-to-head competition in the multichannel video marketplace. That, obviously, is not what Congress sought to promote, and thus militates strongly in favor of a ban on all future perpetual exclusive MDU contracts.

A ban on perpetual exclusive MDU contracts would not effect an unconstitutional taking

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[68] *See, e.g.*, Comments of DirecTV, Inc. at 7.

[69] The Commission has long recognized that competition spurs incumbents to introduce new services or improve existing ones. *See, e.g., Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Notice of Proposed Rulemaking*, 9 FCC Rcd 7665, 7666 (1994) ("[I]n providing communications services, the public interest is better served by competition. A competitive industry framework promotes lower prices for services, provides incentives for operators to improve those services and stimulates economic growth.").

of private property under the Fifth Amendment. It is well settled that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[70] Thus, for example, a cable operator's loss of exclusivity by virtue of the Act's prohibition against exclusive franchises does not rise to the level of an unconstitutional taking:

> [The cable operator's] exclusivity provision was part of its contract, but it did not constitute the entirety of the contract. Evidence that [the cable operator] still provides services in accordance with the contract's remainder, coupled with the fact that one can logically discuss exclusivity as a characteristic separate from the contract, indicates that the destruction of exclusivity is not equivalent to destruction of the contract.[71]

The above quotation applies with equal force to perpetual exclusive MDU contracts for multichannel video services: where the incumbent retains a contractual right to remain on the property and provide service on a non-exclusive basis, the loss of exclusivity via Commission action cannot be said to constitute destruction of the entire contract. Indeed, in the multichannel video context, Time Warner has already acknowledged that exclusivity is severable from an incumbent's broader contractual right to provide service, and has specifically asked the Commission to allow an incumbent's non-exclusive rights to remain in force where the incumbent's exclusivity has been eliminated.[72] When viewed in this context, it is apparent that an incumbent's loss of an exclusive right to serve an MDU is not a taking of constitutional

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[70] *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

[71] *Cox Communications, Inc. v. U.S.*, 866 F.Supp 553, 558 (E.D. Ga. 1994).

[72] Comments of Time Warner Cable, CS Docket No. 95-184 and MM Docket No. 92-260, at 10 (filed Dec. 23, 1997).

dimension.

C. **The Commission Should Ask Congress for Specific Guidance as to the Scope of the Commission's Authority to Resolve the MDU Access Problem.**

As a general matter, the Coalition believes that the Commission has ample jurisdiction under to attack the MDU access problem with stronger cable inside wiring rules. The United States Supreme Court has confirmed that Congress meant to confer "broad authority" on the Commission, so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."[73] Courts thus have recognized that the Commission has certain discretion when applying Congressional policies to marketplace developments not anticipated when Congress passed the Communications Act of 1934.[74] The manifest lack of significant competition to cable, and the corresponding need for competitors and new entrants to have full and fair access to MDU property and the existing wiring therein, represents exactly the sort of changed circumstances which the Commission can and should regulate more aggressively under its statutory authority and its current mandate to promote competition among all multichannel video programming providers.

To the extent that the Commission still believes that it does not have jurisdiction to

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[73] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979), *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940 (citations omitted). *See also National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943) (Congress granted the Commission "expansive powers" through the Communications Act).

[74] *See, e.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 138 (1940) ("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966) ("Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.").

address any or all of the problems identified above, the Coalition believes the Commission must continue to work closely with Congress to clarify any ambiguities on this issue and, if necessary, develop legislation that would give the Commission unequivocal jurisdiction over all matters affecting MVPD competition in the MDU environment. Early last year, the Commission specifically advised Congress that "[c]larification or confirmation of the Commission's authority" with regard to MDU access "would likely increase competition by removing uncertainty and eliminating obstacles that many alternative MVPDs encounter in competing with incumbent providers."[75] The Coalition agrees, and thus urges the Commission to work with Congress to fashion whatever legislation the Commission believes is necessary to clarify that the Commission has sufficient jurisdiction to modify or expand its existing cable inside wiring rules to promote *bona fide* consumer choice in the MDU environment.

V. CONCLUSION

The Coalition recognizes that, measured nationally, incumbent cable operators have lost market share in the last year, amounting to three percentage points of the total MVPD market. The incumbent cable industry remains dominated by incumbent cable operators. More important than the national market share however, is that in the individual markets in which competition is developing, the incumbent cable industry continues to engage in numerous anticompetitive practices, including denial of access to programming, program pricing which is discriminatory,

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[75] Letter from William E. Kennard, Chairman, Federal Communications Commission, to The Hon. W.L. (Billy) Tauzin, Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection, U.S. House of Representatives, Response to Question 9(a) at 17-18 (Jan. 23, 1998). *See also* testimony of a senior Commission official on May 13, 1999, before the House Subcommittee on Telecommunications, Trade and Consumer Protection concerning the scope of the Commission's authority to address inside wiring issues: "[I]t would save a lot of time, effort, and sleepless nights for us if the Congress were so inclined to tell FCC go this far, don't go any further than this and just what the standards would be." Tr. at 39.

and denial of access to inside wiring in MDUs, in which some 30% of the MVPD subscribers are to be found. In the rapidly evolving MVPD market, the Commission cannot passively allow such abuses to occur. To date, the Commission's hesitancy about its authority to act, and its refusal to address program access complaints on the merits, only encourages the incumbents to continue to use various contractual or operational devices to slow competitive entry. The Commission has an affirmative obligation under § 601 of the Act to "promote competition,"[76] and under § 628 to "promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market ..."[77] To fulfill those obligations, the Commission must either assert jurisdiction under the Act as it exists, or, if it believes such assertions are not justified by current law, seek new legislation so that the Commission can aggressively address the existing industry problems.

[76] 47 U.S.C. § 521(b).

[77] 47 U.S.C. § 521(b).

Respectfully submitted,

COMPETITIVE CABLE COALITION

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APPENDIX A

1. Ameritech New Media, Inc.

Ameritech New Media, Inc. has franchises in 109 Midwestern cities and towns containing 1.7 million households and a total population of more than 4 million. It now offers americase®, an enhanced cable TV service, to consumers in 91 of these communities.

2. BellSouth Entertainment, Inc.

BellSouth Entertainment, Inc. is a wholly owned subsidiary of BellSouth Corporation and provides overall planning, management and employee services to its video affiliates BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. BellSouth Interactive Media Services, Inc. currently holds 21 franchises to provide cable "overbuild" service in local markets throughout the Southeast, representing approximately 1.4 million potential cable households. BellSouth Wireless Cable, Inc. holds Multipoint Distribution Service ("MDS") and instructional Television Fixed Service ("ITFS") channel rights covering approximately 3.5 million homes in several large markets in Florida, and in Atlanta, New Orleans and Louisville.

3. Hiawatha Broadband Communications, Inc.

Hiawatha Broadband Communications, Inc. is a locally-owned business and education venture, located in Winona, Minnesota. About 40% of its capital stock is owned by local schools and education foundations. Hiawatha is building a 750 MHz fiber-optic and coaxial-cable communications system. It currently provides cable television and Internet access to its subscribers, and intends to add telephone services for voice, video and data communications.

4. Mainstreet Communications, LLC

Mainstreet Communications is a competitive local exchange carrier and competitive cable provider located in Sauk Centre, Minnesota. Mainstreet has constructed a state-of-the-art hybrid fiber-optic and coaxial-cable communications network enabling the provision of local telephone, long distance, cable television and Internet access services. Building on its foundation in Sauk Centre, Mainstreet intends to expand into additional markets in the near future.

5. RCN Corporation

RCN is offering an integrated bundle of local and long distance telephone service, high speed Internet access, and broadband video service primarily to residential subscribers located in the Boston to Washington corridor, and on the West Coast. RCN holds CLEC certifications in numerous states and is one of the largest ISPs in the country. It is the leading open video system ("OVS") operator and has a total of more than 900,000 service connections. Its state-of-the-art fiber optic cable passes 427,000 homes.

6. Seren Innovations, Inc.

Seren Innovations Inc., a wholly owned subsidiary of Northern States Power Company, operates and constructs hybrid-fiber coaxial (HFC) cable systems in Minnesota and California. Seren has secured Competitive Local Exchange Carrier (CLEC) status from the Minnesota and California Public Utilities Commissions and has secured cable television franchises from the cities of St. Cloud, Waite Park, Sartell and Sauk Rapids Minnesota and Concord California. Seren is negotiating additional franchises in the Contra Costa CA county area. Seren provides cable TV telephone, and Internet access services to its customers within its HFC networks.

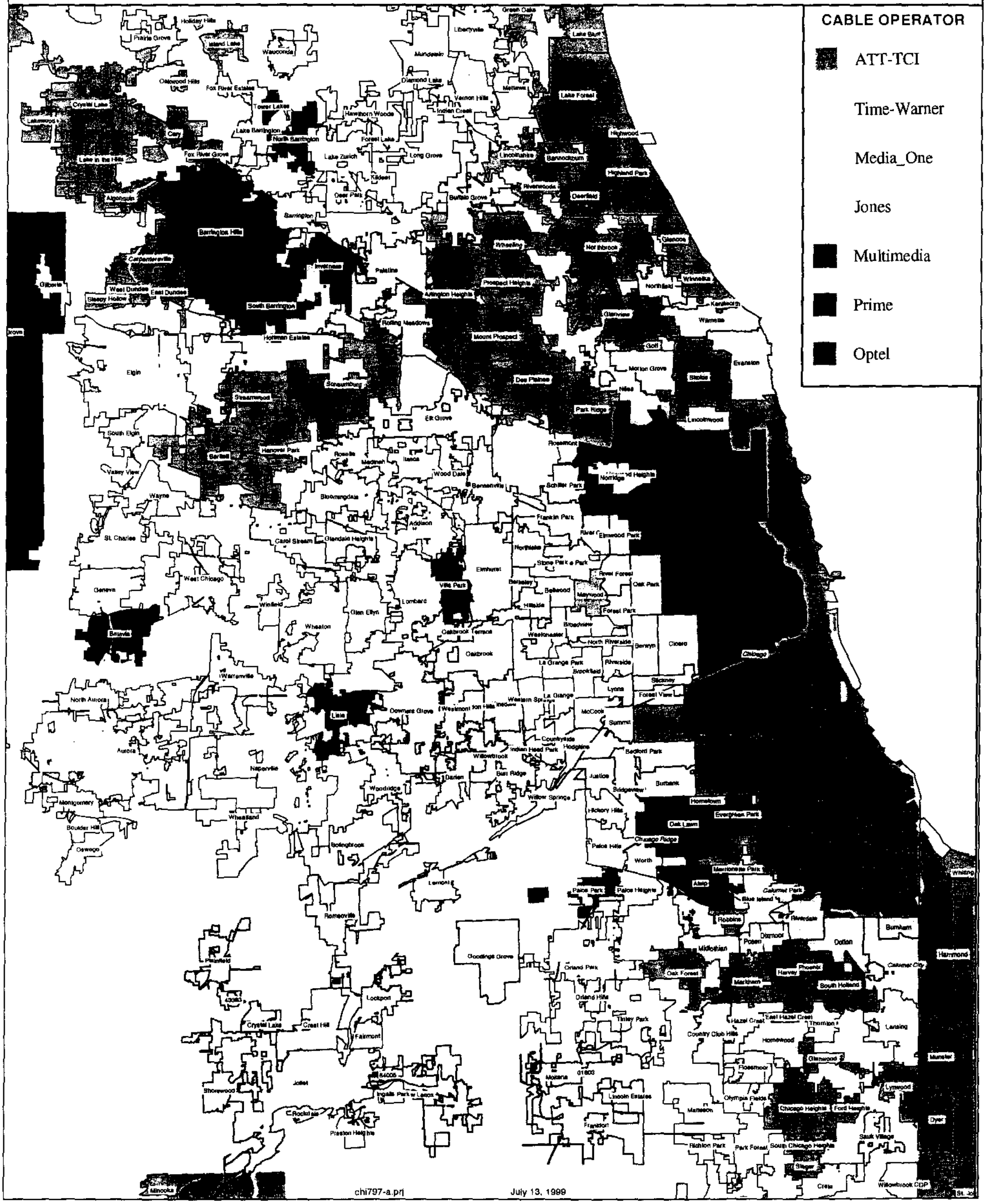
7. Unitel Communications

Unitel Communications is a joint venture of the West Central Telephone Association and Arvig Enterprises, located in Park Rapids, Minnesota. Unitel has constructed a sophisticated broadband communications network to provide competitive local exchange service, cable television service and high-speed data connectivity. Unitel plans to enter into adjacent markets as a competitor in the near term.

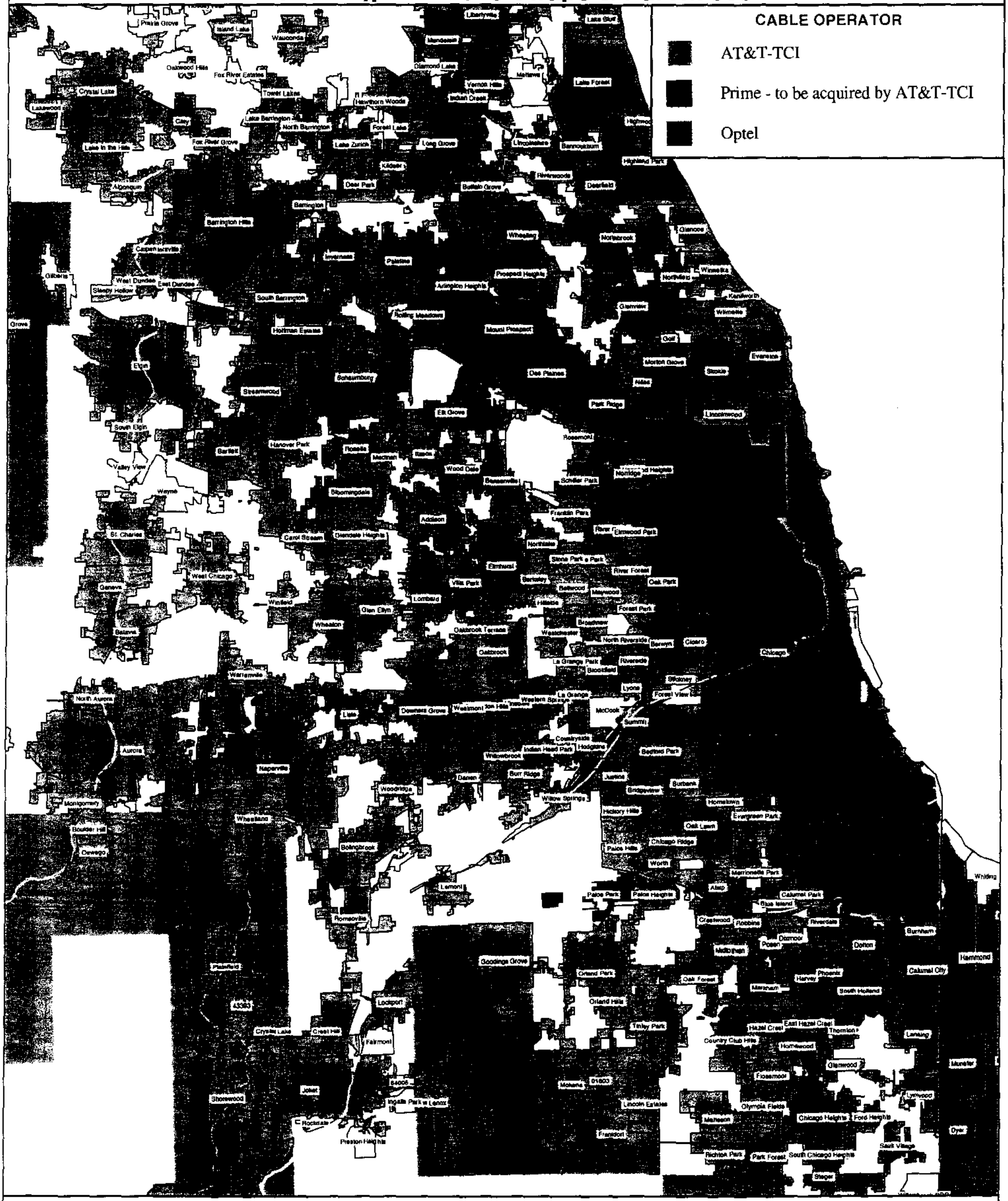
APPENDIX B

Cable Competition as of July 1, 1999

Chicago Area



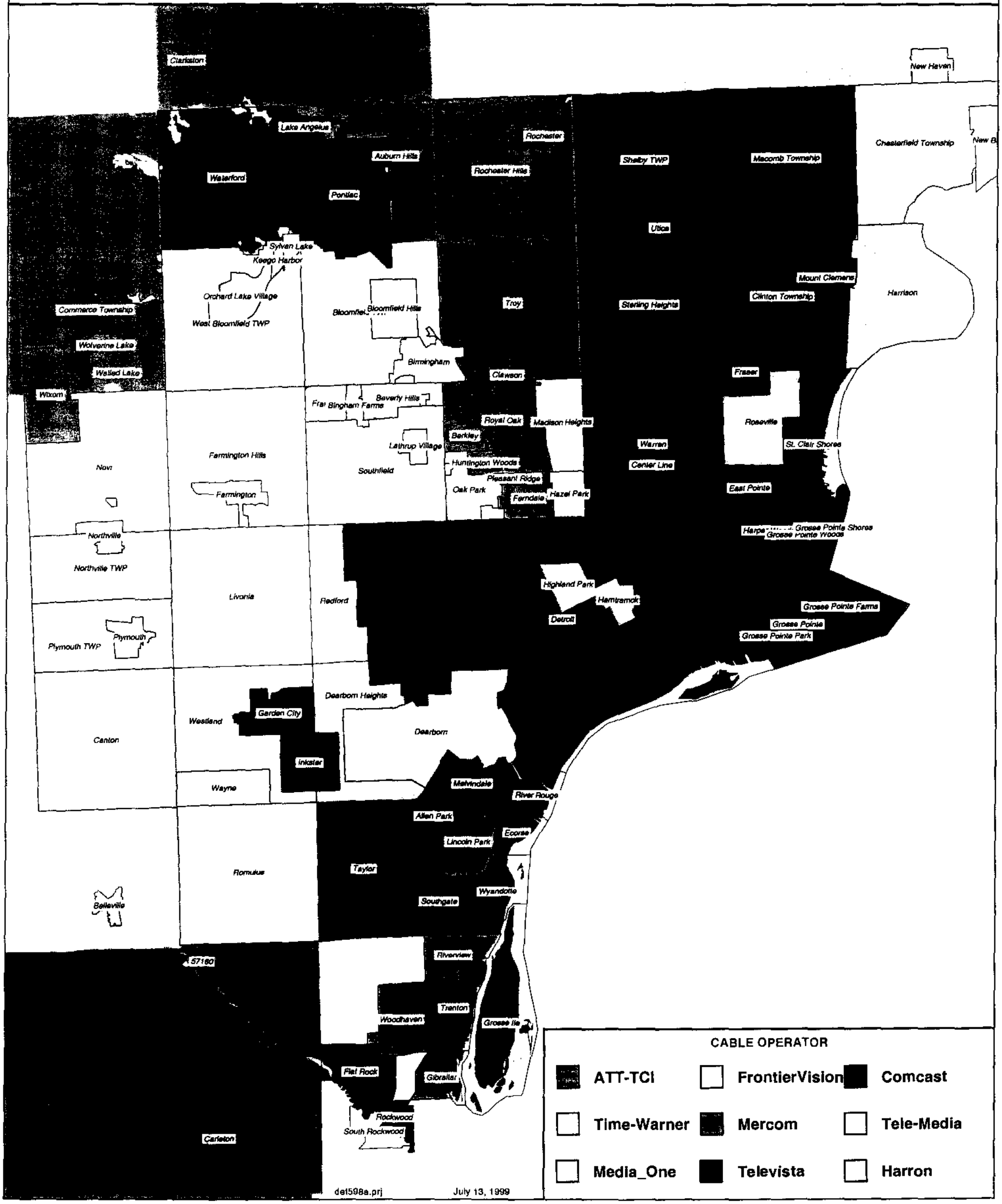
Cable Competition
Chicago Area
Following ATT-TCI's Swaps & Purchases



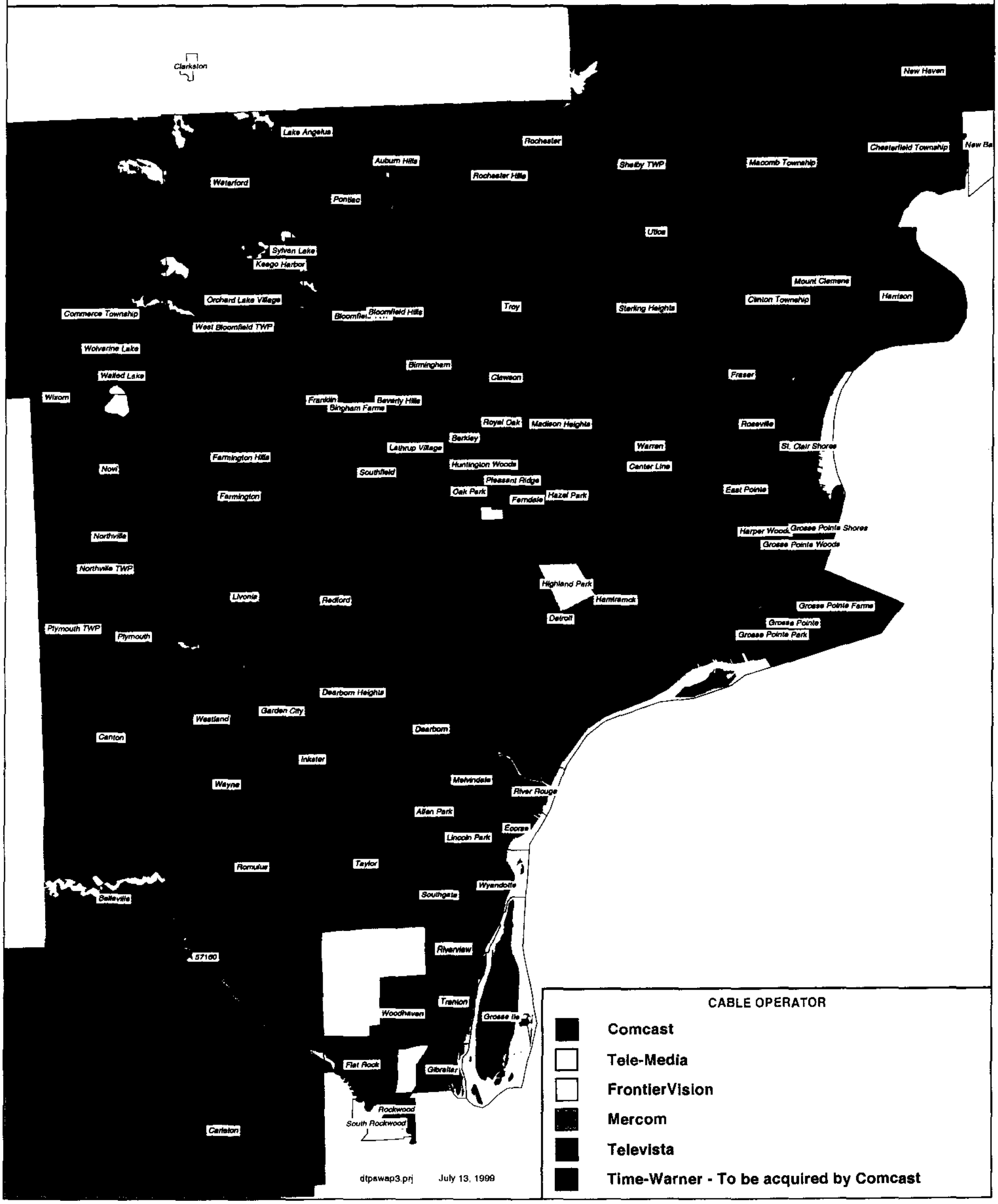
July 13, 1999

Cable Competition as of July 1, 1999

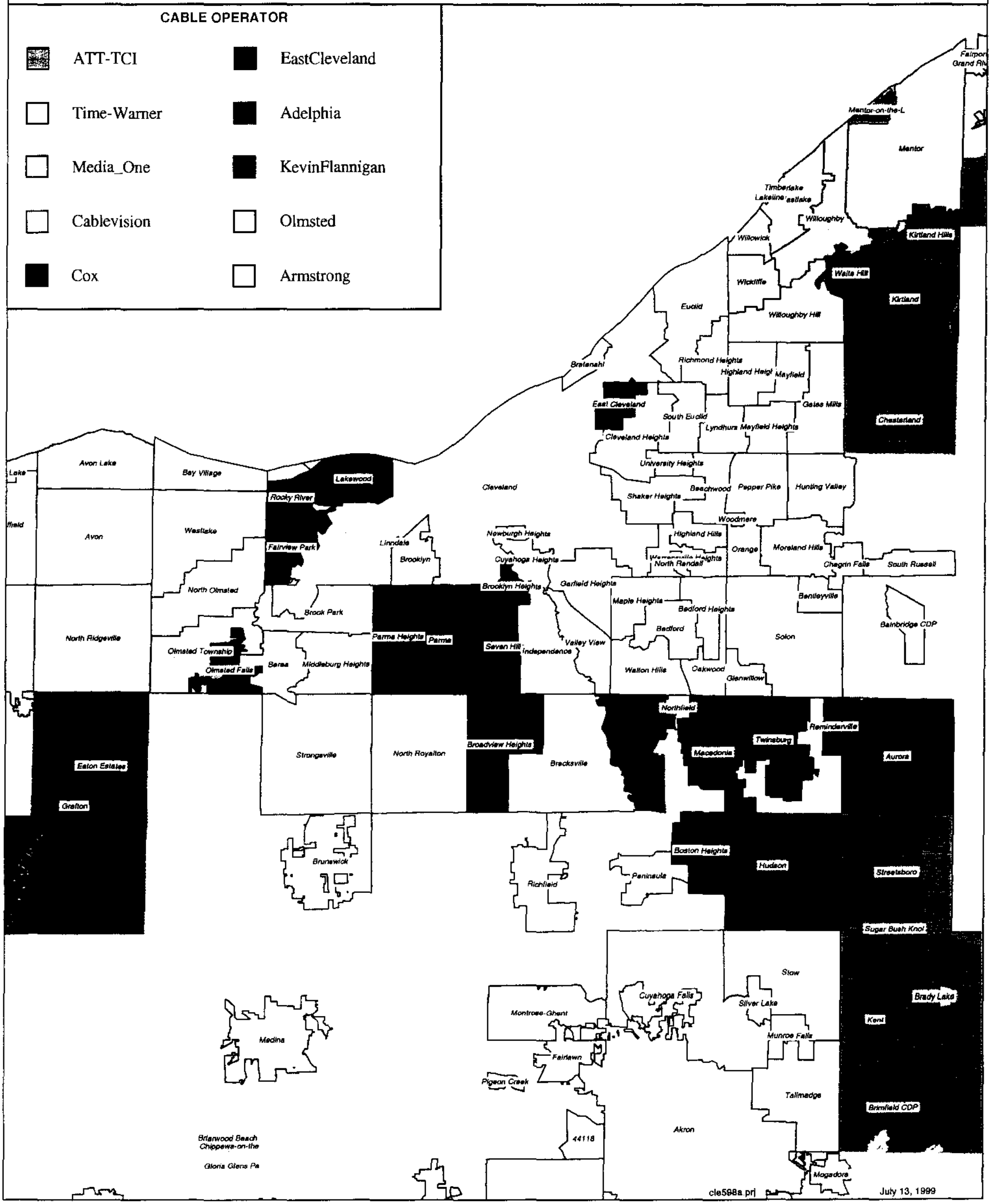
Detroit



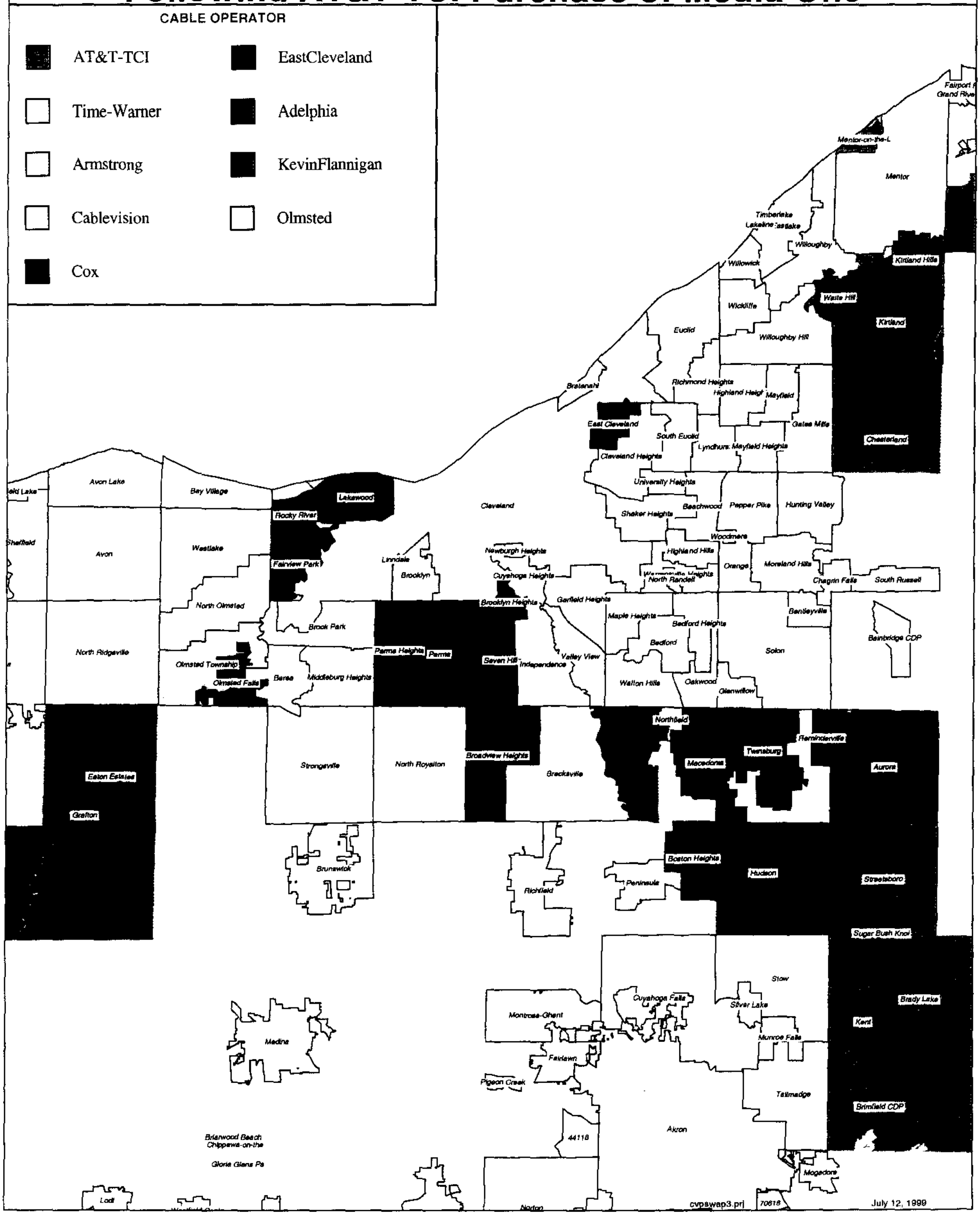
Cable Competition
Detroit
Following Comcast Swaps



Cable Competitors as of July 1, 1999
Cleveland

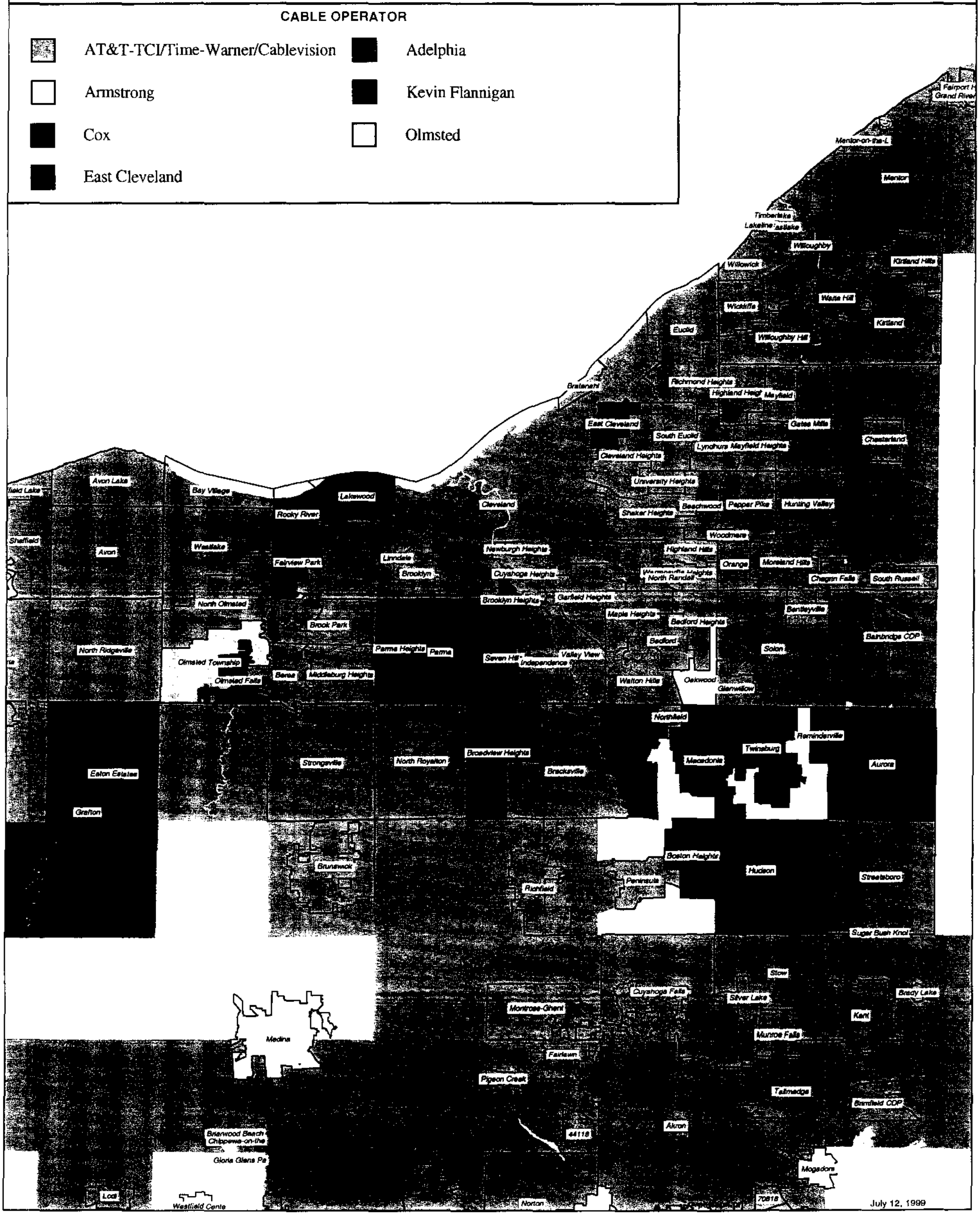


Cable Competitors--Cleveland Area Following AT&T-TCI Purchase of Media One



Cable Competitors--Cleveland Area

Systems in Which AT&T Has An Attributable Interest



Cable Competition as of July 1, 1999
Columbus Area